PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1953
No. 438

R 154

FOREST LAWN MEMORIAL-PARK ASSOCIATION, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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FOREST LAWN MEMORIAL-PARK ASSOCIATION, INC.,
Petitioner,

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Forest Lawn Memorial-Park Association, Inc., prays that a Writ of Certiorari issue to review the decree of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on September 16, 1953, and respectfully shows:

Opinions Below.

Decision and Order of the National Labor Relations Board [R. 50] are reported at 97 N. L. R. B. 309 (1951). The opinion of the Court of Appeals [R. 154] has not yet been officially reported.

Jurisdictional Statement.

The statute believed to sustain the jurisdiction of this Court is Section 1254 of Title 28 of the United States Code.

Questions Presented.

1. Did petitioner engage in labor activities affecting commerce within the meaning of the Act or within the meaning of the Commerce Clause of the United States Constitution?

2. By reenactment of the National Labor Relations Act in 1947 did Congress give the force of law to prior National Labor Relations Board policy of refusing to assert jurisdiction over mortuaries and cemeteries?

3. Did the court below err in holding that the order of the Board could be enforced against petitioner at a time when it is not (if it was ever) subject to the provisions of the National Labor Relations Act?

Statute Involved.

The statute, the proper application of which is involved, is the National Labor Relations Act as amended (Secs. 151 *et seq.* of Tit. 29, U. S. C.), which confers power upon the National Labor Relations Board to prevent persons from engaging in unfair labor practices affecting commerce. Pertinent provisions of the Act are set forth in the Appendix.

Summary Statement of the Case.

1. Summary of Procedure Below.

Petitioner seeks review of a decree of the United States Court of Appeals for the Ninth Circuit filed September 16, 1953, enforcing an order of the National Labor Relations Board directing petitioner to take certain action regarding the alleged commission of certain unfair labor practices by petitioner [R. 158].

After filing by the Union of an unfair labor practice charge against petitioner [R. 1], the Board issued its complaint based thereon (Case No. 21-CA-1077) [R. 3], and a hearing before a Trial Examiner of the Board was conducted [R. 59]. Facts bearing on the interstate commerce question were stipulated by counsel and admitted in evidence [R. 19, 61].

Petitioner had served subpoenas *duces tecum* on each of the members of the National Labor Relations Board to appear at the hearing with certain files and records of the Board [R. 13-19, 63], to prove that at all times prior to the enactment of the Taft-Hartley Act and for several years thereafter, the Board had an established policy under which it refused to assert jurisdiction over mortuaries and cemeteries. After extended discussion between counsel and the Trial Examiner [R. 63, 74-85, 93-94], during which the existence of such policy was undisputed, and on motion of counsel for the Board members the Trial Examiner quashed the subpenas [R. 86].

Then petitioner moved for a dismissal of the complaint for lack of jurisdiction on the ground that it was not engaged in commerce within the meaning of the National Labor Relations Act, and that none of its labor practices could affect commerce within the meaning of the Act. The Trial Examiner reserved decision on this motion and petitioner withdrew from the hearing, preferring to rest its entire defense upon what it regarded as a clear-cut lack of jurisdiction of the subject matter [R. 94].

After the hearing the Trial Examiner issued his Intermediate Report denying petitioner's motion to dismiss [R. 32] and finding that petitioner had committed unfair labor practices affecting commerce within the meaning of the Act [R. 36].

The Board adopted the Trial Examiner's finding in its decision and order [R. 50] and subsequently petitioned the Court of Appeals for the Ninth Circuit for enforcement of its order [R. 143].

Thereupon petitioner moved the Court of Appeals for leave to adduce additional evidence, on the basis of supporting affidavits showing that petitioner had changed its method of operation so that it no longer handled remains of deceased persons which the families intended to ship outside the state, and had substantially reduced the volume of its purchases originating out of state [Supp. Record 167]. The court denied such motion on or about June 24, 1952 [Supp. Record 173], reported in *National Labor Relations Board v. Forest Lawn Memorial-Park Association,* 198 F. 2d 71 (9th Cir., 1952).

Following the receipt of briefs and hearing of oral argument on the jurisdictional issue, the Court of Ap-

peals entered its decree on September 16, 1953, enforcing the Board's order [R. 158].

On application of petitioner issuance of mandate has been stayed by such court pending the filing of this petition on or before October 26, 1953, such date to be continued pending the final disposition of the case by the Supreme Court of the United States.

2. Summary of Facts Pertaining to the Jurisdictional Issue.

Petitioner is a non-stock, non-profit cemetery association of lot owners in Forest Lawn Memorial-Park (hereinafter called "Forest Lawn"), an operation which began in 1906 [R. 19, 20] and which has included the operation of a mortuary located within the cemetery grounds since 1933 [R. 20]. Petitioner is but one of 75 private cemeteries in Los Angeles County, California, and of 50,000 in the United States. There are in excess of 150 mortuary concerns in Los Angeles County and over 25,000 in the United States [R. 27].

Forest Lawn is an integrated operation, containing within a sacred memorial park a mausoleum, three interdenominational churches, a mortuary, and hundreds of art treasures including paintings, statuary, stained glass and architectural masterpieces.

The labor practices complained of involved only embalmers employed at petitioner's mortuary, which is only one of 27 different departments. The mortuary has been adjudicated by the California Supreme Court to be but an incidental feature of petitioner's primary function of operating a cemetery. *Wing v. Forest Lawn Cemetery Association*, 15 Cal. 2d 472, 101 P. 2d 1099 (1940).

Petitioner's receipts during the 12 months' period ending April 30, 1951, totaled $4,621,803.00, coming from sales of cemetery properties, services and supplies, including graves, crypts, niches, interment charges, cremations and mortuary services. There were 6,115 sales of cemetery properties and 5,905 interments. [R. 21].

In the same 12 months' period petitioner purchased capital equipment, materials, and supplies for Forest Lawn Memorial-Park as a whole of a value of $1,242,-244.00. Of this total amount, only $40,452.00 worth was shipped to petitioner directly from out of state. $216,-884.00 worth of the items purchased locally and shipped from establishments located in California had its original source outside the state. Approximately 50%, or $128,-568.00, of the purchases directly or indirectly originating out of state consisted of capital equipment for the cemetery, such as marble statuary and other objects de art, seats for the Hall of Crucifixion, water pipes, furniture and fixtures, etc. Such purchases for the preceding five years averaged only $50,000.00 [R. 20, 21].

In the same 12 months' period petitioner handled 3,870 mortuary cases, of which 97% were concluded by interment in the State of California [R. 21, 22]. In most of the remaining cases, which the families ultimately had shipped for burial out of California, petitioner furnished all of its customary funeral and mortuary services which were locally performed [R. 22, 23]. The nature of such services is as follows:

When a death occurs, upon a call from a member of the deceased's family, petitioner's specially trained employee goes to the home or hospital, prepares the body for movement, and then transports the body by car to

petitioner's mortuary. There petitoner embalms the body, performs cosmetic and restoration skills to remove the pallor of death and make the deceased appear as natural in life as possible, and dresses the body in the proper clothing. The body is then placed in a casket selected by the family, and the deceased is positioned in a reposing or slumber room where the relatives and friends may view the body. The funeral director prepares the death certificate, obtains the attending doctor's signature thereto, and files the same. He also obtains the necessary interment permit, and places an obituary notice in a local newspaper.

Within two or three days after death at a time selected by the family, the funeral director arranges and conducts the funeral services in one of the three Forest Lawn churches, or very rarely, in a church outside of Forest Lawn. Petitioner brings the family to the service in one or more limousines. The funeral director and his assistants place the casket near the altar, arrange the flowers in the chapel, furnish the altar and other accoutrements for the faith of the deceased, usher the friends and relatives into the chapel, open and close the religious ceremony, and furnish organist, soloist, attendants, and casket bearers, if requested. Then the body. the family, and the flowers are transported to the resting place at Forest Lawn and graveside rites are conducted. Through it all petitioner counsels, advises, and comforts the family of the deceased.

There is no separate charge made for any one element of these many services, and after the services have been performed, there is nothing of tangible value to show for them [R. 22, 23]. No goods are created by peti-

tioner, it only performs a local service of a highly personal and confidential nature. In all cases where out-of-state shipment occurred, petitioner acted only as agent without compensation, making the arrangements for the clients who were the consignors, who paid all shipping charges [R. 23, 24]. Even the Trial Examiner recognized that the services of petitioner in connection with the transportation of the bodies was merely an accommodation to the clients. In footnote 1 of his Intermediate Report he found it proper to exclude the figure of $5,700.00 (transportation charges) from the figure used in determining jurisdiction, inasmuch as it represented expenditures for services performed by the carriers [R. 34].

Of the cases concluded by out-of-state burial, only four-tenth of one per cent (.004) were handled for out-of-state clients. These paid a total of $9,337.00 for the usual locally performed mortuary services, of which one-third, or $3,112.00, represented the value of caskets, and in addition paid $640.00 for shipping cases. Thus, receipts from caskets and shipping cases totalled only $3,752.00, which was only .08% of the total receipts for the year ($4,621,803.00).

Local clients, who themselves made the remaining out-of-state shipments, paid $40,150.00 for the usual locally performed mortuary services, of which one-third, or $13,383.00, represented the value of caskets, and in addition paid $3,445.00 for shipping cases. Thus, receipts from such caskets and shipping cases totalled only .36% of the total receipts of petitioner for the year [R. 22, 23].

Specification of Errors.

The Court of Appeals erred:

(1) In holding that petitioner engaged in labor activities affecting commerce within the meaning of the Act.

(2) In holding that reenactment of the Labor Act did not give the force of law to prior Board policy of refusing to assert jurisdiction over cemeteries and mortuaries.

(3) In failing to remand the proceeding to the Board for the receipt of evidence establishing the Board's prior practice with regard to cemetery and mortuary cases.

(4) In failing to find that Congress intended that cemeteries and mortuaries are and should remain beyond the jurisdiction of the Board.

(5) In failing to hold that reversal by the Board of its long-standing rule of hearing cases involving mortuaries or cemeteries amounted to the issuance of a rule of general policy required by the Administrative Procedure Act to have been published in the Federal Register.

(6) In failing to remand the case to the National Labor Relations Board for the receipt of further evidence, showing that petitioner has not shipped bodies out of state since the first of 1952 and has substantially reduced its purchases of materials originating out of state.

(7) In enforcing the Board's order.

(8) In granting prospective effect to the Board's order.

Reasons Relied on for Allowance of the Writ.

1. **In View of the Large Number of Cemeteries, Mortuaries, and Other Organizations Performing Local Professional Services, It Is of National Importance for This Court to Decide Whether Labor Activities of Such Organizations Affect Commerce Within the Meaning of the National Labor Relations Act or the Constitution.**

So far as has been determined the Court of Appeals for the Ninth Circuit is the only federal court having decided whether the labor practices of a cemetery or mortuary could affect commerce within the meaning of the Act or Constitution.[1] Due to the fact that such activities are not commercial and do not involve production in the ordinary sense but partake of a professional nature, and considering the large number of organizations similar to petitioner which are affected by the decision below, this important question calls for final decision by the United States Supreme Court.

Jurisdiction was based in large part by the court below upon the fact that in a small percentage of the mortuary cases handled by petitioner, the human remains, after petitioner has performed all its services, were taken outside the state for burial. This result was reached even though it was the clients who were consignors and petitioner acted only as their agent. In such a case no transportation of *goods* in the accepted sense takes place. A dead body is not a commodity. It is not even property in the usual sense. *Gray v. Southern Pacific Co.*, 21 Cal. App. 2d 240, 68 P. 2d 1011 (1937); *Steen v. Whit-*

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[1]In addition to this case the court below has decided *National Labor Relations Board v. Hazen et al.*, 203 F. 2d 807 (9th Cir., 1953).

tington, 9 Cal. App. 2d 445, 50 P. 2d 118 (1935); *In re Wong Yung Quy,* 2 Fed. 624 (C. C. D. Calif., 1880). A body and casket are intended for interment only and the shipping case, not intended for further use, has no value unless it be for scrap. Thus, nothing of commercial value is transported; nothing is intended for the channels of commerce. There is no interstate *business* occurring between petitioner and its clients.

In order to affect commerce, petitioner's activities would have to be related to the interstate movement of products, messages, or credits. A dead body is none of these, and petitioner is engaged solely with the preparation and burial of the dead.

Labor strife may have a decided impact upon ordinary business activity but death is controlled only by the immutable laws of nature. Regardless of labor strife or interpretations of the Act, people will continue to die and be buried.

It is submitted that the court below wholly failed to appreciate the basic question involved.

As the measure of interstate activity the Court counted all amounts received by petitioner for its locally performed mortuary, funeral and related services in those cases where out-of-state burial occurred. This unrealistic approach disregards the nature of the services rendered.

The component parts of the *"services"* rendered in connection with a dead human body are those normal *funeral services* performed in connection with the preparation of dead human remains for memorialization and interment. The shipping across state lines for interment adds nothing to the *services* performed.

Such services include, among other services:

(a) A minister, a rabbi, a priest, a reader, or some other religious representative.

The decision of the court below would thus hold that the *funeral sermon affects* interstate commerce.

(b) A soloist who may be accompanied by a pianist or organist.

The decision of the court below would thus hold that the singing of a religious hymn *affects* interstate commerce.

(c) A funeral ritual by the American Legion; the fraternal ceremonies of the Elks, the Masons, the Knights of Columbus, or the mass of the Catholic Church.

These are part of the *services* that the decision of the court below holds *affects* interstate commerce.

(d) The use of a church or chapel for the holding of the funeral ceremony.

Thus, the use of the church becomes a part of the *services* and *affects* interstate commerce according to the court below.

(e) The preparation of the dead human remains by embalming, restorative demisurgery, the use of cosmetics.

But these services are performed upon a dead human body in which there is no *property* and are, therefore, not in connection with a *product* which moves in interstate commerce.

To affect interstate commerce the funeral services performed, if they are to be in commerce, must be in con-

nection with a *product* which moves in interstate commerce. The *services* here involved are performed in connection with a dead human body in which courts have universally held there is no *property*. It would seem logically to follow, then, that if the dead human body is not *property*, it is not a *product*—if it is not a *product*, then in the shipping of the body across state lines, nothing of a commercial nature has moved in interstate commerce and the services in connection therewith can, under no stretch of the imagination, *affect* interstate commerce. Such services are truly local in character and on a par with other local activities such as those of lawyers, consultants, those practicting the healing arts, hotels, sanitariums and hospitals.

The fact that in a few of the cases, after petitioner has performed its local services, the body is interred in some other state is entirely incidental to the main activity.

But even if that were not so, the only items which could be considered in determining dollar volume of interstate activity are the shipping cases and possibly the caskets, which are transported solely for ultimate consumption in the interment of the dead human remains they contain.

Furthermore, the court below ignored the distinction between out-of-state and local clients of petitioner. In the case of a local client petitioner has no interstate contacts whatever. Surely, the fact that after petitioner has completed all its services for which it is compensated, the local client with petitioner's assistance makes a non-commercial shipment of the body for burial cannot convert all that has gone before into interstate commerce.

The court below has previously held location of the customer to be of vital importance in determining whether commerce is affected. *Cf. National Labor Relations Board v. Idaho Maryland Mines Corp.*, 98 F. 2d 129 (9th Cir., 1938) (customer located in same state as seller), with *Fox v. Summit King Mines,* 143 F. 2d 926 (9th Cir., 1944) (shipments to out-of-state customer). See also *McLeod v. Dilworth Co.,* 322 U. S. 327, 64 S. Ct. 1023 (1944), involving the constitutionality of a state taxing statute as applied to particular sales, which held that a sale made in Tennessee upon the request of an Arkansas customer was a transaction in interstate commerce and therefore not subject to the state taxing statute; it was the fact that the order came from an out-of-state customer which made the transaction one in interstate commerce.

This Court has clearly established that personal effort not related to production is not a subject of commerce and does not become so merely because of prior or subsequent interstate transportation. *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs,* 259 U. S. 200, 209, 42 S. Ct. 465, 466 (1922). In that case this Court held that the interstate movement of a major league baseball team to play its games was merely incidental to the exhibitions, and did not affect commerce. Shipment of a body to its final resting place, after local performance of all the various mortuary and funeral services by petitioner, is also merely an incidental activity. The decision of the court below conflicts in principle with the *Federal Baseball Club* case.

Petitioner notes the presence on the Supreme Court's docket of three cases involving professional baseball, ap-

parently calling for further consideration of the interstate commerce question: *Toolson v. New York Yankees, Inc.*, Docket No. 18; *Kowalski v. Chandler*, Docket No. 23; *Corbett v. Chandler*, Docket No. 25. Also pending is *Howell Chevrolet Company v. National Labor Relations Board*, Docket No. 34, which conflicts with *National Labor Relations Board v. Bill Daniels, Inc.*, 202 F. 2d 579 (6th Cir., 1953), on a question of interstate commerce under the National Labor Relations Act. Petitioner respectfully suggests to the Court that the instant case, when considered with such pending cases, will afford opportunity for a more comprehensive pronouncement on the interstate commerce questions involved.

The decision below also conflicts in principle with *Spears Free Clinic and Hospital v. Cleere*, 197 F. 2d 125, 126 (10th Cir., 1952), which was an action for damages under the Clayton Act for restraining the practice of chiropractic. Jurisdiction was sought on the basis of the travel of patients from out of state to the clinic for treatment. In dismissing, the court held that the practice of the healing arts is wholly local in character, and is not brought into commerce by the fact that patients come from out of state for treatment.

The decision below is also in conflict in principle with *Hart v. B. F. Keith Vaudeville Exchange*, 12 F. 2d 341, (2d Cir., 1926), and *Conley v. San Carlos Opera Co.*, 163 F. 2d 310 (2d Cir., 1947), also involving the Sherman Act. These cases held that the transportation of stage properties, apparatus, costumes, etc., across state lines and the travel of the performing artists was merely incidental to the essentially local nature of vaudeville.

Jurisdiction was based to some extent by the court below upon petitioner's having purchased supplies and capital equipment having its original source outside the state. The court below did not distinguish between amounts paid for supplies and for non-recurring purchases of capital equipment, nor did the court take into account the fact that the capital purchases for the 12 months' period in question were unusually large in petitioner's experience. It is hard to comprehend how labor difficulties between petitioner and its embalmers in its mortuary could affect petitioner's purchases of capital equipment and fixtures for its cemetery. It is of great practical importance to employers in many related fields for this court to decide to what extent, if any, dollar volume of purchases of a concern engaged in the local performance of professional services or other characteristically local activities, may be considered in determining whether its labor practices could have a substantial effect upon commerce.

There are a large number of cemeteries and mortuaries in the United States which will be affected by the decision of the court below. Undoubtedly, many of the mortuaries prepare bodies which are buried in other states. If the decision of the court below is allowed to stand, an entire new field of activity may be opened by the National Labor Relations Board and its jurisdiction may even be extended to such organizations as hospitals, clinics, and other professional and service organizations. This court should therefore grant certiorari in this case in the interest of authoritatively deciding whether it is proper for the Board to function in this field.

2. The Decision of the Court Below Is in Conflict With Decisions of This Court Regarding the Effect of Re-enactment of a Statute Upon Prior Administrative Interpretation and Practice Thereunder, and Will Have an Unsettling Effect Upon the Field of Administrative Law Unless Reviewed by This Court.

The record shows it to be undisputed to have been the consistent practice of the Board during the entire twelve-year existence of the Wagner Act, and for several years after its amendment by Taft-Hartley, to refuse to assert jurisdiction in cemetery and mortuary cases. Indeed, this practice was continued without interruption until 1951, when the Board decided in *Riverside Memorial Chapel, Inc.*, 92 NLRB 1594 that Riverside Memorial Chapel, Inc., a multi-state mortuary operation, was subject to the Act [R. 72-73]. While there are apparently no officially published rulings or decisions of the Board stating such policy, the fact is that there are many unpublished decisions of the Board, particularly those where action of the Regional Director in dismissing a petition for representation has been sustained on appeal to the Board in Washington.

If the record is not adequate on this point petitioner certainly should not be prejudiced by the improper denial by the Board and the court below of the opportunity to present evidence establishing such prior administrative practice. The Trial Examiner quashed subpoenas *duces tecum* by which petitioner expects to prove not only long failure of the Board to act in cemetery or mortuary cases, but its repeated refusals to assert jurisdiction.

The action of the court below is clearly in conflict with the following principles:

(a) The fact that powers have long been unexercised calls for close scrutiny as to whether such powers ever existed. *United States v. Morton Salt Co.,* 338 U. S. 632, 70 S. Ct. 357 (1950).

(b) Refusal or failure to assert jurisdiction for a long period of time is a fact to be considered in determining non-existence of jurisdictional power. *Federal Trade Commission v. Bunte Bros., Inc.,* 312 U. S. 349, 61 S. Ct. 580 (1941).

(c) Long-settled interpretation or practice of an agency under a statute attains the force of law upon a reenactment of the statute. *National Labor Relations Board v. Gullett Gin Co.,* 340 U. S. 361, 366, 71 S. Ct. 337, 340-341 (1951); *Helvering v. R. J. Reynolds Tobacco Co.,* 306 U. S. 110, 114-115, 59 S. Ct. 423, 425 (1939).

3. A Conflict in Principle Exists Between the Decision of the Court Below and Decisions of This and Other Courts of Appeal as to Whether Petitioner's Cessation of Activities Allegedly Affecting Commerce Deprived the Board of Such Jurisdiction as It May Have Had.

Although the court below apparently regarded the interstate movement of bodies for burial as the principal basis for the existence of jurisdiction, it held that it was immaterial that petitioner had stopped handling mortuary cases where the bodies were to be interred in some other state, and had substantially reduced its annual purchases from out-of-state sources. Decision of the court below is reported at 198 F. 2d 71 (9th Cir., 1952). The court supported its decision by citing *National Labor Relations*

Board v. Cleveland-Cliffs Iron Co., 133 F. 2d 295, 300 (6th Cir., 1943), and *Williams Motor Co. v. National Labor Relations Board,* 128 F. 2d 960, 963, 964 (8th Cir., 1942).

Such decision conflicts with *United Corp. v. Federal Trade Commission,* 110 F. 2d 473 (4th Cir., 1940); *United States ex rel. Sejnensky v. Tod,* 285 Fed. 523 (2d Cir., 1922); *cf. National Labor Relations Board v. Jones & Laughlin Steel Co.,* 331 U. S. 416, 428, 67 S. Ct. 1274, 1281 (1947); cf. *National Labor Relations Board v. Grace Co.,* 184 F. 2d 126, 130 (8th Cir. 1950), which hold that occurrence of subsequent events may operate to deprive an administrative agency of previously existing jurisdiction.

It is of widespread importance, both in the field of labor relations and in other areas of administrative law, to have this conflict resolved by this Court.

Conclusions.

It is respectfully urged for the reasons above stated, that (1), the Court of Appeals has so misconstrued the National Labor Relations Act in finding jurisdiction of the Board to exist, has so ignored the cited decisions of this court, and has so far departed from the accepted and usual course of judicial proceedings, in enforcing the Board's order and in failing to remand the case to the Board for further proceedings, and (2), such conflicts of law and such unanswered questions exist with regard to important points of federal law, as to call for an exercise of the power of supervision of this court.

Wherefore, petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to the end that the errors referred to may be corrected by this court.

Dated: October 22, 1953.

Respectfully submitted,

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